ORIGINAL

No. 94-9088

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MEIRL GILBERT NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the weight assigned to a dosage unit of LSD by the Sentencing Commission for purposes of calculating a defendant's offense level under Sentencing Guidelines § 2D1.1 governs the determination of the weight of the "mixture or substance" containing LSD for purposes of applying the mandatory minimum sentencing provisions of 21 U.S.C. 841(b).

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OPINIONS BELOW

The opinion of the district court is reported at 846 F. Supp. 1362. The opinion of the court of appeals (Pet. App. A1405-A1416) is reported at 46 F.3d 1405.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1995. The petition for a writ of certiorari was filed on May 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner was convicted of

possession of lysergic acid diethylamide (LSD) with intent to distribute it, in violation of 21 U.S.C. 841, and conspiracy to possess LSD with intent to distribute it, in violation of 21 U.S.C. 846. On his motion for reduction of sentence made pursuant to 18 U.S.C. 3582(c)(2), petitioner was sentenced to 120 months' imprisonment, the mandatory minimum term required by 21 U.S.C. 841(b)(1)(A)(v), to be followed by five years' supervised release. The court of appeals affirmed.

1. In a series of transactions that took place in February and March of 1988, petitioner sold LSD to an undercover agent of the Illinois State Police and a confidential source working with the police. All of the LSD sold was carried on blotter paper. See Original Presentence Report (PSR) 8-13 (May 9, 1989). The narcotics sold contained 11,456 dosage units of LSD. See Updated PSR 3 (Mar. 4, 1994). The total net weight of the LSD purchased from petitioner, including the weight of the blotter paper, was 109.51 grams. Original PSR 13.

Because the total net weight of the LSD, including the blotter paper, exceeded ten grams, petitioner was subject to a mandatory minimum sentence of ten years' imprisonment under 21 U.S.C. 841(b)(1)(A)(v), which imposes a ten-year sentence for offenses involving ten grams or more of a "mixture or substance" containing LSD. See Chapman v. United States, 500 U.S. 453, 468 (1991) (21 U.S.C. 841(b) "requires the weight of the carrier medium to be included when determining the appropriate [mandatory minimum] sentence for trafficking in LSD").

Furthermore, under the version of Sentencing Guidelines § 2D1.1 in effect at the time of his sentencing (June 19, 1989), an offense involving more than 100 grams of LSD yielded a base offense level of 36. Petitioner received a reduction in his offense level of two points, to 34, for acceptance of responsibility. Original PSR 14-15. Because petitioner had prior convictions, he was in criminal history category III, and his Guidelines sentencing range was 188 to 235 months' imprisonment. See id. at 17-18. The district court sentenced him to 192 months' imprisonment.

2. On November 1, 1993, the Sentencing Commission amended Guidelines § 2D1.1(c) through amendment 488 to provide:

> In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

Guidelines § 2D1.1(c) n.*. The Commission also amended the background to the commentary on Section 2D1.1 to explain that its approach "harmonize[d] offense levels for LSD offense levels with those for other controlled substances and avoid[ed] an undue influence of varied carrier weight on the applicable offense level." Guidelines § 2D1.1, commentary (background). The Commission further explained, however, that its "approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence." Ibid. (citing Chapman v. United States, 500 U.S. 453 (1991), and Guidelines § 5G1.1(b)). The Commission also amended Guidelines §

1B1.10(d) to permit retroactive application of amendment 488. Guidelines § 1B1.1(d) (Policy Statement); U.S. Sentencing Comm'n, Guidelines Manual, App. C, amend. 502 (Nov. 1, 1993).

3. On December 10, 1993, petitioner filed a motion to modify his sentence, invoking the retroactive application of the new version of Guidelines § 2D1.1. He contended that the weight of the LSD, as calculated by the new version of Guidelines § 2D1.1, was only 4.58 grams, and therefore he was no longer subject to the ten-year mandatory minimum sentence for offenses involving 10 grams or more of LSD. An updated version of his PSR concluded that, under the new Guidelines, his offense level was 25, which yielded a Guidelines sentencing range of 70 to 87 months. See Updated PSR 4-5.

The district court concluded that petitioner was still subject to the ten-year mandatory minimum sentence. The court noted that the background commentary to the amendment to Guidelines § 2D1.1 stated that the Commission did not intend to overrule this Court's decision in Chapman for the purpose of applying "any mandatory minimum sentence." See Dist. Ct. Op. 3, 846 F. Supp. at 1363. The court thus concluded that "the mandatory minimum sentence of 12 months mandated by 21 U.S.C. §841(b)(1)(A)(v) supersedes [petitioner's] revised guideline range of 70 to 87 months." Ibid. The court did, however, reduce petitioner's sentence to 120 months, since the Guidelines no longer required a sentence in excess of the mandatory minimum level.

4. The court of appeals, sitting en banc, affirmed. Pet. App. A1405-A1416. The court acknowledged that, "[u]nder the district court's interpretation of federal law, a single amount of LSD is assigned two different weights for sentencing purposes: one weight for determining the base offense level under the Guidelines and another weight for determining eligibility for the mandatory minimum sentences provided in 21 U.S.C. § 841(b)(1)(A)(v)." Id. at A1408. The court nonetheless concluded that the district court's interpretation was correct, for the post-amendment commentary to Guidelines § 2D1.1 "clearly indicates that the Commission promulgated Amendment 488 in full recognition that it would create a 'dual weight' system of calculating the weight of LSD for sentencing purposes." Ibid. The court observed that, "[e]ven if an amendment to the Sentencing Guidelines could super[s]ede the Supreme Court's interpretation of a sentencing statute, [the Guidelines commentary] make[s] clear that the amendment to § 2D1.1. purported to do no such thing." Id. at A1409. The court also ruled that Chapman must continue to govern the application of the mandatory-minimum statute because "[t]he Commission is without authority to override Chapman. * * * [as the Sentencing Commission has] only the power to guide judicial discretion within the statutory limits." Ibid.

The court rejected petitioner's arguments based on due process and the rule of lenity. The court concluded that the dual-weight scheme has a rational basis: "[T]hose who deal more

LSD will be punished more heavily than those who deal less, and at a certain point there is a qualitative leap in the seriousness of the deed that will give rise to a sudden rather than an incremental increase." Pet. App. A1410. The court further concluded that the rule of lenity was not applicable to this case because there is no ambiguity in the sentencing structure set up by Congress and the Sentencing Commission. Ibid.

Judge Ripple, joined by Judges Cummings and Rovner, dissented. The dissent concluded that the amended version of Guidelines § 2D1.1 does take into account the weight of the carrier medium by assigning a fixed, uniform weight to carrier media, and that the amended Guideline therefore "is consistent with 21 U.S.C. § 841(b) [and] fully takes into account the Supreme Court's interpretation of § 841(b) in Chapman." Pet. App. A1412. Because, in the dissent's view, "Amendment 488 remains true to the Chapman mandate that the weight of the carrier must be included" (id. at A1416), the dissent would have held the amended version of Guidelines § 2D1.1 applicable to the mandatory-minimum statute as well.

DISCUSSION

Petitioner renews his contention that the weight assigned to a dosage unit of LSD by the Sentencing Commission for purposes of Guidelines § 2D1.1 also governs the determination of the weight of a "mixture or substance" containing LSD under 21 U.S.C. 841(b). Although the court of appeals correctly rejected that contention, we agree with petitioner that the issue warrants

review by this Court. There is now a conflict among the courts of appeals on the question, and, because the issue arises frequently in the lower courts, it should be definitely settled by this Court.

In Chapman v. United States, 500 U.S. 453, 468 (1991), this Court held that 21 U.S.C. 841(b) "requires the weight of the carrier medium to be included when determining the appropriate [mandatory minimum] sentence for trafficking in LSD." It is undisputed that, in this case, the combined weight of the LSD and its carrier medium exceeded ten grams. Under Chapman, therefore, petitioner was subject to a ten-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A)(v).

As petitioner points out, if the Guidelines' new approach to the weight of dosage units of LSD is used instead of the Chapman construction of "mixture or substance," then the weight of the LSD in his case would be only 4.58 grams. Thus, if the Guidelines' approach controls the application of the mandatory-minimum sentencing statute, petitioner would not be subject to the ten-year mandatory-minimum sentence of 21 U.S.C. 841(b)(1)(A)(v), although he would still be subject to the five-year mandatory-minimum sentence of 21 U.S.C. 841(b)(1)(B)(v), for offenses involving one gram or more of a "mixture or substance" containing LSD. Under the Sentencing Guidelines, petitioner would have an offense level of 25 and would fall within criminal history category III; his corresponding sentencing range would be 70 to 87 months' imprisonment. That range is substantially less

than the ten-year mandatory-minimum sentence required by Section 841(b)(1)(A)(v).

The en banc court of appeals concluded that the Chapman interpretation continues to govern the definition of "mixture or substance" in the mandatory-minimum sentence statutes, and that the Sentencing Commission, in amending Guidelines § 2D1.1, neither overruled Chapman for mandatory-minimum cases nor had the authority to do so. Pet. App. A1408-A1409. That decision is consistent with the decisions of the majority of the other courts of appeals that have considered the issue: like the court below, the First, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits have ruled that this Court's decision in Chapman, rather than the dosage weight assigned to LSD in Guidelines § 2D1.1(c) by amendment 488, controls the determination of the weight of LSD for the purpose of applying the mandatory minimum sentencing provisions of 21 U.S.C. 841(b). United States v. Bollwage, 47 F.3d 431 (11th Cir. 1995) (Table), petition for cert. pending, No. 94-8475; United States v. Andress, 47 F.3d 839, 840-841 (6th Cir. 1995); United States v. Thomas, 36 F.3d 1095 (4th Cir. 1994) (Table), petition for cert. pending, No. 94-8233; United States v. Pardue, 36 F.3d 429, 431 (5th Cir. 1994), cert. denied, No. 94-8025 (May 15, 1995); United States v. Dimeo, 28 F.3d 240, 241 (1st Cir. 1994); United States v. Mueller, 27 F.3d 494, 496 (10th Cir. 1994); United States v. Boot, 25 F.3d 52, 54-55 (1st Cir. 1994).

The Ninth Circuit, however, has concluded that the dosage

weight assigned to LSD in Guidelines § 2D1.1(c) does govern the determination of the weight of LSD for the purpose of applying 21 U.S.C. 841(b). See United States v. Muschik, 49 F.3d 512 (9th Cir. 1995).[1] There is therefore a conflict among the circuits on the issue presented in this petition, and little likelihood that the Ninth Circuit will reconsider its position. On May 1, 1995, the Ninth Circuit denied the government's petition for rehearing. Moreover, the Muschik panel was aware of the contrary authority in other circuits -- including the decision of the court of appeals in this case -- but it expressly rejected that authority in its opinion. See id. at 515 ("We reject the contrary result reached by the Seventh, Fifth, Tenth, and First Circuits.").

The question presented warrants the Court's review, for it concerns an important federal statute used in the prosecution of narcotics offenses. Moreover, the issue has arisen frequently. Six other petitions for a writ of certiorari currently before the Court raise the same issue. See Thomas v. United States, No. 94-8233; Bollwage v. United States, No. 94-8475; Flanagan v. United States, No. 94-8797; Kiker v. United States, No. 94-8839; Cichon v. United States, No. 94-9315; Hofer v. United States, No. 94-9312. The Court also recently denied review in two other cases raising the issue. See Pardue v. United States, No. 94-8025 (May

[1] A panel of the Eighth Circuit reached a similar conclusion, but that decision was vacated on the government's petition for rehearing and suggestion for rehearing en banc. See United States v. Stoneking, 34 F.3d 651 (8th Cir. 1994).

15, 1995); Sassi v. United States, 115 S. Ct. 1121 (1995).

This case appears to be an appropriate vehicle for resolution of the issue, for, of the seven petitions currently before the Court raising the question, this is the only one in which the issue is addressed extensively in the decision of the court of appeals. The petitions in Thomas, Bollwage, Flanagan, and Kiker all seek review of short, unpublished decisions of the courts of appeals; the decisions in Cichon and Hofer simply followed the decision below in this case. We therefore suggest that the Court grant review of the decision in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES** by first class mail, postage prepaid, on this 31st day of May 1995.

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May 31, 1995